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No. 680

In the Supreme Court of the United States

October Term, 1962

CLAYTON I. KARTEN AND DOROTHY KARTEN,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]

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OPINIONS BELOW

The court of appeals rendered no opinion. The orders of the court of appeals (Pet. 9–12) and district court (Pet. 13–14) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1962. The petition for a writ of certiorari was filed on December 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed an appeal by petitioner Clayton L. Kasten from an order dismissing an action to suppress evidence on the

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ground that, an indictment having been returned against him, the order was not appealable.

2. Whether the court of appeals erred in dismissing the appeal by petitioner Dorothy Kasten, a joint plaintiff in the same action, in view of the fact that neither the complaint nor the supporting affidavits showed any violation of her rights.

STATEMENT

On September 21, 1960, petitioners, husband and wife, filed a complaint (R. 7–16)[1] in the United States District Court for the Eastern District of Wisconsin, alleging that Internal Revenue agents had obtained certain books and records from petitioner Clayton L. Kasten by false representations made to him. The complaint requested an injunction against the use of the evidence so obtained in any criminal proceeding, and that all copies and transcripts of such records be returned. The government moved to dismiss (R. 18) and filed an affidavit (R. 19–23) in which the Special Agent in charge of the investigation of petitioner denied the alleged deceit, and stated that all the original records had been returned to Clayton Kasten.[2] The complaint and Clayton Kasten's affidavit refer to the records as his (R. 10, 24–25). In her affidavit, Dorothy Kasten stated that, "as she is informed," the records were obtained from her husband (R. 26).

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[1] "R." refers to the typewritten record on the first appeal. "Supp. R." refers to the typewritten record on the second appeal.

[2] In their affidavits (R. 24–26), petitioners do not controvert the fact that the original documents were returned.

On January 3, 1961, on the basis of the affidavits and the testimony of the Special Agent,[2] the district court denied the requested preliminary injunction, finding that no irreparable injury would result and that there was no "likelihood" that petitioners would ultimately prevail on the merits (R. 115–117).

Petitioners appealed on January 3, 1961 (R. 118). On the following day an indictment for attempted tax evasion was returned against Clayton Kasten (Pet. 4, 12). The court of appeals dismissed the appeal (Pet. 11–12) on the basis of an affidavit filed by the government stating that the indictment had already been returned, and that no criminal proceedings against Dorothy Kasten were or ever had been contemplated.[4]

Subsequently, the district court, after hearing argument, dismissed petitioners' action on September 26, 1962, observing that Clayton Kasten had an adequate remedy in the criminal proceeding and that no criminal proceeding was pending or contemplated against Mrs. Kasten (Pet. 13–14; Supp. R. 19–20). Petitioners again appealed, and the court of appeals dismissed the appeal on November 16, 1962 (Pet. 9–10).[5]

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[2] See the separate transcript (150 pages) of the proceedings on December 30, 1960.

[4] Affidavit of Howard C. Equitz, Assistant United States Attorney, dated February 2, 1961.

[5] The government had filed an affidavit signed by Philip L. Padden, Assistant United States Attorney, dated November 6, 1962, stating *inter alia* that the criminal action against Clayton Kasten was still pending, and that no criminal proceeding against Dorothy Kasten "is now pending or being considered, nor has any been considered at any time" (Pet. 21–22).

ARGUMENT

1. The court of appeals was clearly correct in dismissing the appeal by Clayton Kasten, since he was already under indictment when the district court dismissed the action, and the district court's order of dismissal was therefore not a final, appealable order. "Orders granting or denying suppression in the wake of such proceedings [presentation before a United States Commissioner or a grand jury] are truly interlocutory, for the criminal trial is then fairly in train." *DiBella* v. *United States*, 369 U.S. 121, 131.

2. As to petitioner Dorothy Kasten, the complaint and supporting affidavits stated no facts which could have entitled her to the relief requested. In her affidavit, she did not allege that any representations were made to her, that the records were hers, or that the records were obtained from her. On the contrary, she admitted that the records were obtained from her husband. Therefore, while Mrs. Kasten claims that she did not "authorize" her husband to waive her constitutional rights (R. 26), no facts have been alleged even suggesting that any rights of hers were violated.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1963.